

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)

Petition of BellSouth Telecommunications, Inc.)
For Forbearance Under 47 U.S.C. § 160(c) From)
Application of Computer Inquiry and Title II)
Common-Carriage Requirements)
_____)

WC Docket No. 04-405

REPLY COMMENTS OF

**NATIONAL ASSOCIATION OF
TELECOMMUNICATIONS OFFICERS AND ADVISORS;
NATIONAL LEAGUE OF CITIES;
U.S. CONFERENCE OF MAYORS;
TEXAS COALITION OF CITIES FOR UTILITY ISSUES;
GREATER METRO TELECOMMUNICATIONS CONSORTIUM;
METROPOLITAN AREA COMMUNICATIONS COMMISSION;
MT. HOOD CABLE REGULATORY COMMISSION;
CITY OF EUGENE, OREGON;
AND
MONTGOMERY COUNTY, MARYLAND
(THE "LOCAL GOVERNMENT COALITION")**

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INTRODUCTION

The Local Government Coalition respectfully urges the Commission to deny the Petition for Forbearance (the "Petition") of BellSouth Telecommunications, Inc. ("BellSouth").

Opponents of the Petition have demonstrated that it is utterly without foundation, while its supporters have produced nothing of substance to shore up BellSouth's failing arguments. The Commission should instead advance a policy based on the regulation of the facilities layer of all providers and the promotion of long-standing social policies.

I. The Vast Majority of Commenters Oppose Forbearance, and Present Compelling Arguments Against the Petition.

Rarely are comments in response to a proposal before the Commission as uniformly opposed as they are in this case. Even more rarely is a proposal so thoroughly dissected to reveal its fundamental flaws and inconsistencies as BellSouth's Petition has now been. The Petition has been revealed to be overly broad, unsupported by the facts and the law, and contrary to sound policy. Based on the record now before it, the Commission must deny the Petition.

In our opening comments, we criticized the Petition on the following grounds:

- The Petition is premature, because the Commission must first develop a rational and coherent regulatory scheme.
- The Commission does not have the authority to lift all restrictions on incumbent LEC broadband facilities.
- The Petition does not identify the specific provisions of current law that should not be enforced.
- The Petition does not clearly identify the relevant product market.
- The Petition does not clearly identify the relevant geographic market.
- The Petition relies almost entirely on the claim that the current retail market is competitive, but in fact the current market is not competitive; it is at best a duopoly.
- None of the statutory conditions for forbearance is met.
- Continued regulation of BellSouth's broadband facilities is necessary to ensure reasonable rates and prevent unjust discrimination.
- Forbearance would only entrench the duopoly and in the end harm consumers.
- Forbearance would harm a great many other interests, including universal service, disability access, 911 capability, and others.
- Regulation of the facilities layer is necessary to protect competitors and consumers.

The comments of other parties echo and amplify these criticisms.¹ Commenters agreed widely, for instance, that the statutory conditions for forbearance were not met.² There is also a consensus among commenters that the Petition is misleading, because it relies on claims about the state of competition in the retail market to justify deregulation of the wholesale market.³

Perhaps the most important point made by Internet service providers, competitive local exchange carriers, and other parties is that the key policy underlying common carrier regulation is not the promotion of competition, but the prevention of discrimination.⁴ Thus, these parties note that BellSouth's emphasis on the state of retail competition obscures the fact that forbearance would free BellSouth to discriminate against other carriers, ISPs, and providers of IP-enabled services, such as voice-over-IP. For example, Vonage Holdings Corp. argues that "BellSouth has a vested interest in discouraging or blocking consumers for using VoIP services provided by third parties."⁵ Earthlink states that forbearance would allow BellSouth "to curtail or eliminate competition from ISPs and [CLECs] by giving ILECs the right to demand discriminatory rates and terms for transmission service, and even as has been the case with cable facility owners, to refuse to provide any transmission services at all."⁶ Indeed, AT&T notes that forbearance would hinder the ability of competitors to provide traditional telecommunications services as well as advanced services.⁷ These statements are difficult to refute: it seems highly

¹ See, e.g., AT&T Comments; Earthlink Comments; Federation of Internet Solution Providers of the Americas ("FISPA") Comments; MCI Comments; Vonage Comments.

² See, e.g., AT&T Comments at 26-55; Earthlink Comments at 18-30; Vonage Comments at 9-27.

³ See, e.g., AT&T Comments at 8; MCI Comments at 3.

⁴ See, e.g., Earthlink Comments at 3-10.

⁵ Vonage Comments at i.

⁶ Earthlink Comments at 2.

⁷ AT&T Comments at 14.

unlikely that BellSouth would allow a third party to use its facilities to compete directly with BellSouth, unless the law requires it.⁸

These examples also lend additional strength to the concerns expressed by the Local Government Coalition and others that forbearance would merely entrench the current duopoly in the delivery of retail services.⁹ Not only does a duopoly inherently offer insufficient choices to retail consumers, but a deregulated duopoly threatens to harm consumers even further by limiting access to competitive choices delivered by independent service providers.

Finally, granting the petition would cause direct harm to the public. As Vonage points out, forbearance could interfere with the ability of third-party VoIP providers to provide 911 capability.¹⁰

Commenters have made it plain that granting BellSouth's request would benefit only BellSouth and a few like-situated companies, and would cause substantial harm to practically every other affected entity. The arguments against forbearance are so numerous and powerful that the Commission must deny the Petition.

II. The RBOCs Present No Credible Arguments or Evidence in Support of the Petition.

Qwest, SBC, and Verizon fail to credibly support the Petition. Their comments do little more than to summarize and restate BellSouth's argument, which is essentially that there is already competition in the retail market, and that this competition alone justifies forbearance. As discussed above, the comprehensive and cogent arguments of the opponents of the Petition amply demonstrate the many analytical flaws in BellSouth's position.

⁸ AT&T Comments at 14-14; MCI Comments at 3.

⁹ *See, e.g.*, AT&T Comments at 9; FISPA Comments at 27-28; Vonage Comments at 5, 10, 12-16.

¹⁰ Vonage Comments at 7-9.

Qwest argues that the Commission should forbear “because there is robust intermodal competition in broadband transmission services” Like BellSouth, Qwest assumes that all that is required to meet the three-pronged test of Section 10 is a mere allegation that competition exists. Not only does this effectively rewrite the statute, which requires separate showings for each prong, but Qwest’s claims regarding the scope of competition are false. As we stated in our opening comments, intermodal competition is a chimera. Other commenters made the same point.¹¹ Qwest also makes bald assertions regarding competition for broadband transmission services from cable modem providers, ignoring the fact that with limited exceptions cable operators do not provide such services.¹²

SBC makes much the same argument, with no better result. Essentially, SBC asserts that forbearance is required because there is competition in the delivery of broadband services,¹³ and also that forbearance is required because common carrier regulation is impeding competition.¹⁴ Not only are these claims contradictory; they also overstate the case. First, such competition as does exist takes the form of a duopoly, rather than a fully-functioning competitive market. Second, BellSouth and other LECs are performing well, despite the alleged burdens of common carrier regulation. For example, the Commission’s latest figures show that between December 2003 and June 2004, the number of high speed ADSL lines grew by 20%, compared to 13% for coaxial cable lines; during the same time period the number of advanced services ADSL lines grew by 24%, compared to 15% for coaxial cable.¹⁵ The Commission’s figures also show that

¹¹ See, e.g., Earthlink Comments at 20-21; Vonage Comments at 13.

¹² FICPA Comments at 28-30.

¹³ SBC Comments at 10.

¹⁴ SBC Comments at 13.

¹⁵ *High-Speed Services for Internet Access: Status as of June 30, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau (Dec. 2004), Tables 1 and 2.

since December 1999, the number of high-speed ADSL lines has increased over 30 times, compared to only a 13-fold increase for coaxial cable lines.¹⁶ Interestingly, the rate of growth of ADSL and coaxial cable advanced services lines has been nearly identical since December 1999.¹⁷ These figures suggest that burdensome common carrier regulation has not been a problem.

SBC also makes the specious argument that regulation is not needed because consumers “are quite fond of subscribing to cable modem service”¹⁸ Consumers may well subscribe to a service on unfair terms because they need or badly want the service. Thus, the mere fact that consumers pay for service is hardly evidence of a fully functioning, competitive market. As noted earlier, various commenters have observed that the fundamental purpose of common carrier regulation is to prevent discrimination. Merely because the FCC has so far chosen not to apply such rules to cable modem providers does not mean they may not be necessary or appropriate.

Rather than submit specific comments on BellSouth’s Petition, Verizon chose to file in this docket a copy of its own petition for declaratory ruling. That petition differs little in substance from BellSouth’s and is subject to the same general criticisms. Verizon’s petition differs somewhat from BellSouth’s in that it discusses the level of competition in the market for business retail services, but this only serves to emphasize the lack of competition in the residential retail market, and even more so the utter failure of both Verizon and BellSouth to address the lack of competition in the wholesale transmission market.

¹⁶ *Id.*, Table 1.

¹⁷ *Id.*, Table 2.

¹⁸ SBC Comments at 12.

The arguments of BellSouth and the other RBOCs are reminiscent of those the Commission rejected in *BOC Petitions for Forbearance from Dominant Carrier Regulation*, Memorandum Opinion and Order, 14 FCC Rcd 19,947 (1999). In that decision, the Commission denied five petitions for forbearance because the petitioners had provided only general conclusions about market conditions. The record in that case was insufficient to make a *prima facie* showing that sufficient competition existed to justify forbearance.¹⁹ In fact, it appears that the market analyses in that case were more detailed than any information contained in the BellSouth Petition or the comments of its supporters. BellSouth and its allies once again have failed to meet the statutory standard.²⁰

BellSouth's supporters offer only weak and warmed-over arguments that have already been thoroughly rebutted. The overwhelming weight of the record before the Commission shows conclusively that forbearance is entirely unjustified.

III. The Local Government Coalition Reiterates its Support for the “Layers” Model as Proposed by MCI and Others.

In its comments, MCI repeats its call for a policy framework based on its “layers approach,” in which the physical layer would be subject to regulation. MCI notes that “transmission is not yet available on a competitive basis,”²¹ and so it is necessary to prevent BellSouth and others with market power over transmission facilities from exercising that market power in ways that interfere with competition in the higher layers, such as applications and content. We agree with this concern, but we take issue with MCI's assertion that end users have

¹⁹ *Id.* at ¶ 32-35.

²⁰ See also Earthlink Comments at 12-16; FISPA Comments at pp. 24-25 (hard data needed to justify forbearance, not general conclusions).

²¹ MCI Comments at 3.

a competitive alternative for retail Internet access service.²² As discussed in our opening comments, retail end users outside of the large business market do not have the benefit of meaningful competition. Regulation of the physical layer is necessary to assure that the cable-telco duopoly does not abuse its market power not only over wholesale transmission capacity, but over residential and small business retail customers. The layers model is a rational approach for ensuring competition at both the transmission and end-user levels.

IV. This Proceeding Illustrates the Need for a Better Understanding of the Degree and Nature of Competition in the Various Markets for Broadband Services.

For the last three years, the Commission has pursued a policy intended to promote deregulation of the broadband sector as an incentive to ILEC entry and overall deployment. While well-intended and in some respects successful, this policy has presumed too much about the state of competition in the market. The Local Government Coalition respectfully suggests that before taking any further action in this field, the Commission should undertake a more thorough analysis of the level of competition in existence, the realistic prospects for the development of meaningful competition in all relevant markets, and the likelihood that the resulting environment would serve to protect the public interest and promote traditional social policies without regulatory intervention. As the commenters in this docket have demonstrated, competition can only be assessed with respect to specific product markets and geographic markets. The wholesale transmission market is different from the retail market, and the residential retail market is different from the large business market. Similarly, the level of competition for any type of service will be different in Manhattan, in suburban Denver, and in

²² *Id.*

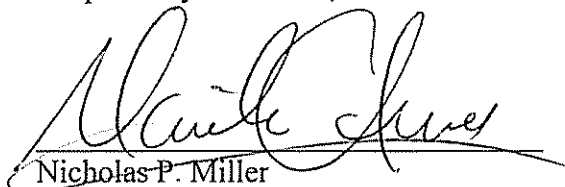
Alaska. The varied and fragmented nature of the market for broadband services makes the Commission's job much more difficult and complicated, but it remains a fact.

The Petition has served a useful purpose, by allowing the parties to demonstrate that regulation is still required to prevent harm to competitors and consumers. Even if the Commission takes steps to ensure the continued viability of such traditional, broadly-supported policies as universal service, disability access, and 911 service, further deregulation is likely to result in fewer, not more choices, for consumers. Accordingly, we urge the Commission to reexamine the assumptions underlying its approach of recent years, and avoid piecemeal or premature deregulation.

CONCLUSION

The Petition is unsupported by the facts, has no legal foundation, and proposes an indefensible policy. The Commission should deny the Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nicholas P. Miller", written over a horizontal line.

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